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Supreme Court, U.S.
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No. 87-____

In the
Supreme Court of the United States

OCTOBER TERM, 1987

GEORGE M. MORTON and
MARLENE J. MORTON,
PETITIONERS,
v.
TOM GARDNER, as Executive Director,
Department of Natural Resources,
STATE OF FLORIDA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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June 1988

QUESTIONS PRESENTED

1. Whether seizure and a 124-day detention of a commercial fishing vessel by State authorities, during a civil forfeiture action in which the owners prevailed and the court denied the State's condemnation petition, gave rise to a claim for Just Compensation for a temporary "taking" under the Fifth and Fourteenth Amendments to the United States Constitution, pursuant to this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, ___ U.S. ___, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

2. Whether the decision of this Court in *The Apollon*, 22 U.S. (9 Wheat) 362, 6 L.Ed. 111 (1824) continues to stand for the principal that a seizing officer seizes at his own peril, that probable cause is not a defense to a seizure absent a statute setting up such a defense, and that the seizing authority is liable in tort to the owner of a seized vessel upon dismissal of the condemnation petition.

THE PARTIES

The parties are petitioners, George M. and Marlene J. Morton, and the State of Florida, as set forth in the caption of the case.

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GEORGE M. MORTON and
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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

OPINIONS BELOW

The prior opinion most pertinent to this Petition, and the judgment under review,[1] is the September 29, 1987,

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[1] The only "judgment" entered in this case is that of the trial court entered April 24, 1986, pursuant to a jury verdict. There is no opinion of the trial court, and the basis for the trial court's judgment is reflected in the opinion of the Third District Court of Appeal. The trial court's judgment is found at Page A-20 of the Appendix to this Petition.

decision of the Third District Court of Appeal of Florida, *Morton v. Gardner*, 513 So.2d 725 (Fla. App. 3 Dist. 1987), *rehearing denied*, Nov. 2, 1987. A petition for discretionary review was denied by the Supreme Court of Florida on April 1, 1988. The decision under review, the order denying rehearing, and the order denying review are reproduced in the Appendix to this Petition.

JURISDICTION

The decision of the Third District Court of Appeal of Florida was entered September 29, 1987, affirming a final judgment for defendant State of Florida, pursuant to a jury verdict, entered by the trial court April 24, 1986. The Third District Court of Appeal's order denying petitioners' motion for rehearing was entered on November 2, 1987. The Florida Supreme Court entered its order denying petitioners' petition for discretionary review on April 1, 1988. The time for filing this petition expires on June 30, 1988, absent an extension. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § § 1257 (3) and 2101 (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Just Compensation clause of the Fifth Amendment to the United States Constitution, made applicable to the State of Florida by the Fourteenth Amendment to the United States Constitution. The Florida Contraband Forfeiture Statute, also involved, is set forth in the Appendix.

STATEMENT OF THE CASE

A. Summary of Pertinent Facts

On March 22, 1984, petitioners' commercial fishing vessel, the MISS JEAN, was seized by Florida Marine Patrol officers pursuant to the Florida Contraband Forfeiture Act, §§ 932.701-.704, Fla. Stat. (1983), on the suspicion that its captain, George M. Morton, had picked up a bale of marijuana floating in the sea, cut it open on the transom of the boat, and pushed the cut bale back into the sea. On that date in 1984, the United States-documented fishing vessel MISS JEAN left Key Largo in the morning to collect lobsters and retrieve some of its lobster traps. The vessel was operated by its owner and captain, peti-

tioner George M. Morton. Shortly thereafter, a Coast Guard officer boarded the Miss Jean, inspected the ship's documents, told Mr. Morton that there were bales of marijuana floating in the area, and warned him not to pick them up should he come upon them. Around noon, a Florida Marine Patrol plane was dispatched on information that the Miss Jean had marijuana bales aboard. The pilot reported that he saw a bale of marijuana on MISS JEAN's transom being pushed into the sea and that the marijuana dispersed as if the bale had been cut open. The captain, Mr. Morton, reported that he had encountered a partially-submerged bale of marijuana and damaged it with his propeller, as he was hauling lobster traps aboard. The pilot radioed other Marine Patrol officers who went to the site by boat and picked up parts of a plastic bag and several pounds of marijuana from the water. When the MISS JEAN was boarded and searched soon thereafter, there were no signs of contraband aboard.

Marine Patrol officers then seized the MISS JEAN, pursuant to the Florida Contraband Forfeiture Act, §§ 932.701-.704, Fla. Stat. (1983), arrested Mr. Morton, and

removed the vessel to a storage facility where it remained, in the sole possession of the State of Florida, for the next 124 days. At the conclusion of a judicial condemnation proceeding in which petitioners prevailed, the vessel was returned to the Mortons.

B. Proceedings Below

Petitioners immediately brought a replevin action to recover the MISS JEAN, and the State responded by the filing of a forfeiture action. Petitioners counterclaimed for damages and inverse condemnation in the forfeiture action. At the condemnation hearing, the Circuit Court found that the MISS JEAN had *not* had contraband on board and ordered the return of the vessel within 24 hours. From the date of seizure until the date of return, petitioners were deprived of all use of the MISS JEAN for 124 days.

Petitioners then served notice on the State of Florida of a tort claim and subsequently amended their complaint in the replevin action, and their counterclaim in the forfeiture proceeding. Their amended complaint and counterclaim were virtually identical (except for the replevin

count) and included counts sounding in tort and in inverse condemnation under the Florida and United States Constitutions. The tort counts were dismissed prior to trial. The trial court allowed the State to assert qualified immunity defenses, based upon "good faith" and "probable cause," to the inverse condemnation counts. The parties waived a jury on the amount of claimants' attorneys' fees, and the inverse condemnation claims and the State's qualified immunity defenses were presented to a jury. On a jury verdict that the State had "probable cause" to seize claimants' vessel, the trial court dismissed appellants' inverse condemnation claims.

The Mortons' claims were initially filed in a complaint seeking replevin of the boat and damages (Case No. 84-20123-CA-17, 16th Judicial Circuit of Florida). When the State brought its civil forfeiture proceeding, the Mortons incorporated their claims for compensation in a counterclaim to the condemnation petition (Case No. 84-358-CA-17, 16th Judicial Circuit of Florida). Left pending after the disposition of the condemnation proceedings were the amended complaint and amended counterclaim filed by

the Mortons. These claims sought compensation on two theories -- tort and inverse condemnation -- each of which was based on the claim that the Mortons had been deprived[2] of the use of their vessel for 124 days, the duration of its detention by the State.

In their amended complaint and counterclaim, on which the combined cases went to trial, Mortons based jurisdiction on the Fifth and Fourteenth Amendments to the United States Constitution, as well as various State constitutional and statutory provisions. Counts XI and XII of the Mortons' amended complaint in Case 84-20123, and Counts I and II of Mortons' amended counterclaim in Case 84-358, contained the following allegations:

> FIFTH AND FOURTEENTH AMENDMENT VIOLATIONS OF UNITED STATES CONSTITUTIONAL RIGHTS OF [MORTONS]
>
> The Fifth and Fourteenth Amendments of the United States Constitution preempt any claim of sovereign

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[2] In its opinion, the Third District Court of Appeal adds the word "wrongfully" modifying "deprived." Mortons brought the tort and inverse condemnation claims as alternative causes of action. If the State's action was "wrongful," Mortons claimed the State was liable in tort. If the State's action was without criticism ("rightful"), the act constituted a "taking" for a public purpose and gave rise to a claim for just compensation. This distinction was lost on the Court of Appeal, but is reflected in the recitation of the complaint and counterclaim *infra*.

> immunity, or in the alternative act as a self-executing waiver thereof, for the taking of any property without just compensation.
>
> [The State of Florida], and [the State's] officers and agents acting within the scope of their employment, deprived [Mortons] of [their] property without just compensation for 124 days, in violation of the Fifth and Fourteenth Amendments, United States Constitution.
>
> [The State of Florida] is therefore liable to [Mortons] for just compensation for loss of use of [Mortons] property pursuant to the Fifth and Fourteenth Amendments, United States Constitution, and all consequential damages flowing from such unconstitutional actions, including attorneys' fees and prejudgment interest computed from October 15, 1984.

The trial court dismissed the tort claim for failure to state a cause of action and allowed the inverse condemnation claim to proceed to trial by jury. The jury, instructed that probable cause to seize the vessel was a complete defense to the inverse condemnation claim,[3] rendered a verdict for the State, expressly finding in its verdict that there was probable cause. Mortons appealed,

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[3] The court, after defining probable cause, instructed the jury:

"If the greater weight of the evidence discloses that the State had probable cause to seize the vessel and had the right to institute forfeiture proceedings, the State is entitled to qualified immunity, then your verdict should be for the defendant, and the State is not liable for any damages alleged to have risen as a result of the seizure of the MISS JEAN."

on the grounds that (i) there is no "probable cause" defense to an inverse condemnation claim, and (ii) that probable cause is no defense to a tort claim for an invalid seizure, unless such defense is created by the legislature.

REASONS FOR GRANTING THE WRIT

Civil forfeiture is a harsh and malevolent procedure in which the accused must prove his innocence, and the state has a reduced burden of proof from that of a criminal forfeiture. Civil forfeiture is a remnant of feudal law in which an accused must prove his innocence by a preponderance of the evidence, rather than have the state required to prove his guilt beyond a reasonable doubt.[4] Civil, as opposed to criminal[5], forfeiture is a foul weapon

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[4] One way to view the shift in burden of proof between a criminal prosecution and a civil forfeiture proceeding is to equate the burdens to probabilities. The government's burden in a criminal case (beyond a reasonable doubt) is akin to about a 95% certainty level, which means that the defendant's burden is about 5%. In the civil forfeiture proceeding the defendant's burden (more probable than not) increases to 51%. This amounts to approximately a 10-fold increase in the burden of proof (ignoring the fiction that it is the "thing" that is the defendant).

[5] In a criminal forfeiture action, the defendant must *first* be convicted of the underlying crime that gives rise to the right of the government to forfeit the personal property used in the crime.

in the arsenal of state agencies.[6] State agencies that utilize the civil forfeiture process should be subject to a system of checks and balances, including the payment of compensation, costs, and attorney's fees to individuals who prevail against them.

The process of warrantless seizure, followed by deprivation of the owner's use of his property for a period of many months, and the costs and burden of proof attendant to recovering one's property from the state at a condemnation hearing, should be anathema to our society. Yet a few states, and the federal government, persist in permitting the practice.[7] The Department of Natural Resources may well suggest the Mortons were innocent bystanders in the state's "war on drugs;" that occasionally innocent bystanders are injured; but that they should quietly accept

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[6] In this case, no State prosecutor exercised any "prosecutorial discretion" at any phase, but rather the filing of the condemnation petition, the initial prosecution, the trial on the Mortons' claims, and the appeals were all conducted by the civil litigation staff of the Department of Natural Resources. It is no secret that criminal prosecutors exercise such discretion regularly, keeping poor or defective cases from being filed. Agency lawyers have no incentive to exercise such discretion, unless it is to preserve the public fisc from their losses.

[7] *See*: Parcels, "An Analysis of Federal Drug-related Civil Forfeiture," 34 MAINE. L. REV. 435-458 (1982).

their economic injury as their "part" in this holy war. There must be a remedy in our laws, or in our Constitution, for the private citizen who has gone through the economic trauma of a civil forfeiture proceeding, and "won." There has to be more than simply getting his property back.[8]

The civil forfeiture defendant's remedy may be inverse condemnation, the "constitutional tort" of interference with property for which no state government has immunity from liability. Inverse condemnation actions can compensate the "winning" defendant by paying just compensation for the loss of use of his property, and for his costs, prejudgment interest, and attorneys' fees. Or compensation

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[8] The Third District Court of Appeal relies on an imperfect criminal analogy, quoting Lord Mansfield in *Cooper v. Booth*, 170 Eng. Rep. 564 (King's Bench, 1785), and its own opinion in *Sponder v. Brickman*, 214 So.2d 631 (Fla. App. 3 Dist. 1968) (*See* Appendix, A-10), for the proposition that acquittal in a criminal trial does not give rise to an action for malicious prosecution *against the arresting officer*, if probable cause existed for the arrest. As strange as it may seem today, the drafters of the Bill of Rights to the United States Constitution provided for just compensation to be paid to persons who are deprived of the use of their *property*, but failed to make the same assurances to persons who are deprived of their *liberty*. Analogies to criminal prosecutions are further weakened by the observation that the civil forfeiture defendant must meet a burden of proof which is 10 times greater than that of any criminal defendant.

may be had by way of the tort theory approved by this Court 164 years ago in *The Apollon*, 22 U.S. (9 Wheat) 362 (1824). This Court should grant Certiorari to consider which of the two, if not both, form the basis for leveling the battleground between the state and the innocent civil forfeiture defendant.

A. The Decision Appealed From Directly Conflicts with the Latest Statement of this Court on the Applicability of the Just Compensation Clause to "Temporary Takings."

The Third District Court of Appeal held that petitioners were not entitled to just compensation because "[i]n Florida, an action for inverse condemnation does not arise from a temporary "taking," citing *Hillsborough County v. Gutierrez*, 433 So.2d 1337 (Fla. App. 2 Dist. 1983) (temporary invasion of *real* property by flood waters held a tort, not a "taking;" damage to *personal* property within the home held to be a "taking"). It also held that "loss of use" claims are not compensable in condemnation or seizure cases, citing *County of Volusia v. Pickens*, 439 So.2d 276, 278 (Fla. App. 5 Dist. 1983) (inverse condemnation plaintiff entitled to *full value* of his property at date of taking,

plus prejudgment interest, but not lost rental income during same period). *See* Appendix at A-11, A-12.

The District Court's decision, rendered September 29, 1987, is completely contrary to the United States Supreme Court's June 9, 1987, decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, ___ U.S. ___, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) (hereinafter *First English*), which case was brought to the District Court's attention by a notice of supplemental authority, pursuant to Florida Rule of Appellate Procedure 9.210 (g), on June 18, 1987. In *First English, supra*, the Supreme Court held that just compensation for "temporary takings" is required by the Fifth and Fourteenth Amendments to the United States Constitution.

> . . . where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. 107 S.Ct. 2378, 2389.

Under the Taking Clause of the Fifth Amendment to the United States Constitution, as applied to the State of Florida by the Fourteenth Amendment, no person may be deprived of property by the government without just com-

pensation. A compensable taking need not be permanent. *First English, supra* (ordinance temporarily prohibited all use of church property); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949) (property condemned for use as military laundry, recovery allowed for diminution in value due to loss of trade).[9] Furthermore, there is no distinction between the taking of real or personal property, and the Constitutional "taking" provision is a self-executing waiver of sovereign immunity. *Jacobs v. United States*, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed.

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[9] *See also: United States v. Pewee Coal Co.*, 341 U.S. 114, 71 S.Ct. 670, 95 L.Ed. 809 (1951) (government liable for operating losses while mine was taken over to avert nationwide coal strike); *R.J. Widen v. United States*, 174 Ct.Cl. 1020, 1032, 357 F.2d 988, 996 (1966) (per curiam) (temporary taking from date United States went on land until land condemned by state); *Causby v. United States*, 109 Ct.Cl. 768, 772, 75 F.Supp. 262, 264 (1948) (temporary taking by flight easement resulting in destruction of personal property); *Todd v. United States*, 155 Ct.Cl. 87, 94-96, 292 F.2d 841, 841-46 (1961) (fishing rights curtailed); *Seery v. United States*, 142 Ct.Cl. 234, 161 F.Supp. 395 (1958) (house in Vienna occupied as resting center for enlisted men).

142 (1933); *Causby v. United States*, 109 Ct.Cl. 768, 75 F.Supp. 262 (1948).[10]

The United States Supreme Court has declared what factual inquiry must be undertaken in determining whether a taking compensable under the Fifth Amendment has occurred. The three factors to be considered are (i) the character of the government action, (ii) its economic impact, and (iii) its interference with reasonable investment-backed expectations. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-1007, 104 S.Ct. 2862, 2874-75, 81

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[10] Florida too has long recognized inverse condemnation actions as authorized by the "taking" provisions of the Florida Constitution. *White v. Pinellas County*, 185 So.2d 468 (Fla. 1966) (taking of personal property, action lies even absent waiver of sovereign immunity); *State Road Department v. Tharp*, 1 So.2d 868 (Fla. 1941) (inverse condemnation action against State for "taking" of water previously available to mill, action lies even without waiver of sovereign immunity by State). *See also Jacksonville Expressway Authority v. Henry G. DuPree Co.*, 108 So.2d 289 (Fla. 1958) (Florida Constitution requires full compensation so that owner is made whole); *City of Jacksonville v. Schumann*, 167 So.2d 95 (Fla. App. 1 Dist. 1964) (inverse condemnation action for "taking" occasioned by aircraft noise guaranteed by state Constitution). At least one of Florida's District Courts of Appeal has since discovered the Supreme Court's decision in *First English, supra,* although not for the purpose of remedying a "temporary taking." *Joint Ventures, Inc. v. Florida Department of Transportation*, 519 So.2d 1069, 1071 (Fla. App. 1 Dist. 1988) (inverse condemnation action guaranteed by Constitution).

L.Ed.2d 815 (1984).[11] In this case, the State has not challenged petitioners' claims that they suffered adverse economic impact, or that the seizure and detention of the MISS JEAN interfered with the Mortons' investment-backed expectations. There can be no doubt that a commercial fishing vessel involves a substantial investment; the record shows that the Marine Patrol's seizing officer, Frank Feliciano, "verified that the value of the boat is $75,000, and that Mr. Morton still has an outstanding [mortgage] balance of approx. $29,334.00." The Mortons' amended complaint and amended counterclaim allege that the Mortons suffered substantial economic loss from the 124-day detention of the MISS JEAN, and it goes without saying that a fisherman will suffer an economic loss when the State takes away his boat. The District Court of Appeal conceded in its opinion that the act complained of was a "taking" for a public purpose, but relied on a tortured reading of inverse condemnation law in

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[11] *Citing, inter alia: Penn Central Transportation Co. v. New York,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

Florida, and ignored *First English, supra*, in depriving the Mortons of their remedy.

B. A State Intermediate Court of Appeal Cannot Ignore or Narrow a Binding Precedent of the United States Supreme Court

The trial court permitted the State to assert the defense that "probable cause for the seizure of the vessel" excused the State from liability for just compensation. The District Court of Appeal rejected this theory but held that probable cause excused the State from tort liability. It has long been true, however, that absent statutory authority creating a probable cause defense in an unsuccessful attempt by government to condemn personal property, there is no probable cause bar to governmental liability in tort. The question of whether probable cause is a defense to tort liability, after seizure and unsuccessful condemnation, was settled 164 years ago in *The Apollon*, 22 U.S. (9 Wheat) 362, 6 L.Ed. 111 (1824).

The Apollon was a French vessel that was seized by a United States tax collector, in the territorial waters of Spain, for the payment of duty. The United States brought a forfeiture action, which it lost. Whereupon the

vessel owner brought an action against the United States for loss of use damages, which he won.[12] The United States argued that "probable cause" for the seizure excused it from paying damages for loss of use, exactly as the State of Florida argued in this case, but the Supreme Court laid that defense to rest, holding:[13]

> Some obscurity [arises] from not distinguishing between the effect of probable cause, in cases of capture *jure belli*,[14] and the effect in cases of municipal seizures. In the case of the former, no principle is better settled in the law of prize, than the rule of probable cause will not merely excuse, but even, in some cases, justify a capture. .... But the case is far different in respect to municipal seizures. *Probable cause has never been supposed to excuse any seizure, except where some statute creates and defines the exemption from damages. The party who seizes, seizes at his peril; if condemnation follows, he is justified; if an acquittal, then he must respond in damages* for the marine tort,

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[12] *The Apollon* decision speaks to a remedy in tort, but in 1824 there was no cause of action styled "inverse condemnation." Inverse condemnation is judge-made law, developed by the courts in several jurisdictions, including Florida, as a substitute for judicial abrogation of sovereign immunity. Largely overshadowed today by legislative waivers of sovereign immunity, inverse condemnation remains an important remedy for non-negligent acts of government, including intentional and discretionary acts, "constitutional torts," which deprive citizens of the use of their property, but for which the legislature is reluctant to provide compensation.

[13] *The Apollon*, 22 U.S. (9 Wheat) 362, 372-373 (1824).

[14] "*Jure belli*" means "by the right or law of war." BLACK'S LAW DICTIONARY, 4th Ed., 990.

> unless he can shelter himself behind the protection of some statute. (Emphasis added.)

Appellants and the State of Florida were not at war; therefore there is no "probable cause" defense to appellants' claims.

The Florida Contraband Forfeiture Act, Fla. Stat. §§ 932.701-704 (1983), was intended to parallel the Federal statute, 49 U.S.C. §§ 781-782.

> The express intent of the Legislature was that the Florida forfeiture statute be in uniformity with its federal counterpart. *Griffis v. State*, 356 So.2d 297, 299 (Fla. 1978).

The federal system of seizure and forfeiture law, to which Florida courts have professed we must look to interpret Florida's Contraband Forfeiture Act, has been largely clothed with the statutory "shelters" suggested by this Court in *The Apollon*. In 1807, Congress enacted a statute permitting a District Judge to issue a "probable cause certificate" insulating the United States from liability for certain costs incident to seizure.[15] The value of a 28 U.S.C. § 2465 "probable cause certificate" (hereinafter § 2465 certificate) dropped precipitously when the Claims Court

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[15] Statutes 1807, Chapter 24, Feb. 24, 1807, 28 U.S.C. § 2465.

held in 1985 that a § 2465 certificate only covers "court costs and costs incident to seizure." *Jarboe-Lackey Feedlots, Inc. v. United States*, 7 Cl. Ct. 329, 336-7 (Cl. Ct. 1985), adopting the Sixth Circuit's 1973 decision in *United States v. One 1965 Chevrolet Impala Convertible*, 475 F.2d 882, 886 (6th Cir. 1973) (§ 2465 certificate only covers court costs and costs "incident to seizure," and government remains liable for value of property or depreciation losses during detention). Even if a District Judge issues a § 2465 certificate today, the United States is not insulated from an inverse condemnation action under the Tucker Act. *See Castleberry v. Alcohol, Tobacco and Firearms Div.*, 530 F.2d 672, 677 (5th Cir. 1976) (District Court stated that, should civil forfeiture claimant prevail in the forfeiture action, he may sue the United States for monetary damages under the Tucker Act).[16]

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[16] *See also: United States v. One 1961 Red Chevrolet Sedan*, 457 F.2d 1353 (5th Cir. 1972) (1965 forfeiture rendered invalid retroactively by Supreme Court in 1971, monetary remedy found in Tucker Act); *Lowther v. United States*, 480 F.2d 1031, 1035 (10th Cir. 1973) (monetary remedy exists under Tucker Act for value of firearms destroyed by government during pendency of forfeiture action); *Jaekel v. United States*, 304 F.Supp. 993 (SD NY 1969) (Tucker Act provides monetary remedy for claimant in forfeiture action tainted by lack of due process).

The District Court of Appeal attempts to limit the scope of *The Apollon, supra*, with language from two federal Court of Appeals decisions, *United States v. Tito Campanella Societa di Navigazione*, 217 F.2d 751 (4th Cir. 1954) and *United States v. 1500 Cases, More or Less*, 249 F.2d 382 (7th Cir. 1957). In *Tito Campanella Societa di Navigazione, supra*, the issuance of a § 2465 certificate by the District Court was challenged on appeal, and the Court of Appeal stated that the seizing *officer* could interpose the defense of reasonable cause in an action for damages, even if no § 2465 certificate had been entered by the District Court. In *United States v. 1500 Cases, More or Less, supra*, the Court of Appeals noted that no § 2465 certificate had been entered -- in fact, none appeared to have been requested -- but that the existence of probable cause excused the government from paying storage costs that predated the actual seizure of some tomato paste. (The government paid the post-seizure storage costs.) Both cases cited by the District Court of Appeal pre-date the Sixth Circuit's 1973 decision in *United States v. One 1965 Chevrolet Impala Convertible, supra*, and the Claims

Court's recent decision in *Jarboe-Lackey Feedlots, Inc. v. United States, supra*, and neither case stands for the proposition that this Court's language in *The Apollon, supra*, has been narrowed or abandoned by the federal judiciary.

The only other case cited by the District Court of Appeal in its attack on *The Apollon, supra*, is *Hammel v. Little*, 87 F.2d 907 (D.C. Cir. 1936). *Hammel v. Little* was a damages suit brought after a criminal action, in which the defendant had prevailed and seized property was returned to him. No forfeiture action was ever commenced by the government in *Hammel*. In *Hammel, supra,* the Court of Appeals rejected, or limited, the above-quoted language in *The Apollon*, by arguing that either the Supreme Court had intended the sweeping language to apply only to the case then before it (*The Apollon*) or, if that was not the case, that the language "should be considered with great deference and respect, but as not controlling." *Hammel v. Little, supra*, has not been cited by the Supreme Court, or by any other court for that matter, as a reasoned basis for overruling *The Apollon, supra.*

The federal government has a much more effective barrier to many forfeiture defendants' recovery of detention damages in tort actions, in the third exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b). That exception, found at 28 U.S.C. § 2680(c), retains governmental immunity, in spite of the FTCA, for "any claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs . . . ." The efficacy of this exception was acknowledged in *Kosak v. United States*, 465 U.S. 848, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984) (no recovery under FTCA for value of art objects lost or damaged during storage by Customs), and produced a strikingly unfair result in *Formula One Motors, Ltd. v. United States*, 777 F.2d 822 (2d Cir. 1985) (no recovery under FTCA for value of imported automobile destroyed by Customs agents in fruitless search for contraband). Even the federal statutory scheme is not perfect, however, in its attempt to immunize the government from tort liability for seizures. The FTCA "detention damages" exception has recently been held *not* to apply in maritime tort actions brought against the United States under the Suits

in Admiralty Act (SIAA) and Public Vessels Act (PVA), which are separate waivers of sovereign immunity that are not cluttered up with the 13 exceptions of the FTCA.[17] *B & F Trawlers, Inc. v. United States*, 841 F.2d 626 (5th Cir. 1988) (failure of Coast Guard personnel to follow regulations governing care of seized vessels renders government liable in tort under SIAA and PVA).

The State of Florida has waived sovereign immunity for tortious acts of its employees, including intentional torts.[18] as long as those employees are acting within the scope of their employment. Fla. Stat. § 768.28. Seizure and detention of a vessel is, at a minimum, the intentional tort of interference with property. Florida, however, has neither a "probable cause certificate" comparable to 28 U.S.C. § 2465, nor an exception for "detention damages,"

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[17] 46 U.S.C. § § 741 *et seq*; § § 781 *et seq.*

[18] *City of Miami v. Simpson*, 172 So.2d 435 (Fla. 1965) (city liable for the intentional torts of its police officers); *Hennagan v. Dept. of Highway Safety and Motor Vehicles*, 467 So.2d 748 (Fla. App. 1 Dist. 1985) (false imprisonment, unlawful search, invasion of privacy); *Clayton v. City of Cape Canaveral*, 354 So.2d 147 (4th DCA 1978) (malicious prosecution).

such as that found at 28 U.S.C. § 2680(c), in the Florida Tort Claims Act.[19]

V. CONCLUSION

The Florida Third District Court of Appeal's decision squarely conflicts with the decision of the United States Supreme Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, ___ U.S. ___, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), in its construction of the Fifth and Fourteenth Amendments to the United States Constitution. The District Court conceded that the 124-day detention of petitioner's vessel was a "taking," yet refused to follow the decision of the United States Supreme Court in *First English, supra*, which holds that just compensation must be paid, pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, even for a temporary taking. The conflict between the District Court's decision and this Court's decision in

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[19] The Legislature presumably knew what it was doing when it enacted the Contraband Forfeiture Act, without amending the Tort Claims Act or providing a statutory probable cause defense. If it did not, it is not the court's province to carve out exceptions to waivers of sovereign immunity.

First English, supra, was raised in the proceeding below by a filing of supplemental authority over three months before the District Court's opinion was filed, and is thereby preserved for review here. The Supreme Court must exercise its discretionary review power and reverse the Florida intermediate appellate court's decision, and remand the case to the trial court for a determination of the compensation to be paid.

Respectfully submitted this
28th day of June, 1988

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APPENDIX

In the District Court of Appeal of Florida, Third District

Case No. 86-1141

George M. MORTON and Marlene J. MORTON,
Appellants,
v.
Tom GARDNER, Executive Director, Department of Natural Resources, State of Florida, Appellee

513 So. 2d 725

September 29, 1987

An Appeal from the Circuit Court for Monroe County
M. Ignatius Lester, Judge.

Before SCHWARTZ, C.J., and DANIEL S. PEARSON and JORGENSON, JJ.

DANIEL S. PEARSON, Judge.

The questions presented on this appeal are (1) whether the seizure of a vessel pursuant to the Florida Contraband Forfeiture Act gives rise to an inverse condemnation claim by the vessel's owner who prevails in the forfeiture proceeding, and (2) whether such prevailing owner is entitled to recover damages in tort for the loss of use of his property. We answer both questions in the negative and affirm the judgment under review.

I.

The Miss Jean, a commercial lobster fishing boat owned by the appellants, George and Marlene Morton, was seized by Florida Marine Patrol officers who were found to have had probable cause,[1] to believe that the vessel was carrying a contraband article -- marijuana -- in violation of the Florida Contraband Forfeiture Act, §§ 932.701-.704, Fla. Stat. (1983). Pursuant to the Act, the State instituted forfeiture proceedings which concluded with the trial court finding that the Miss Jean was not in fact carrying marijuana on the day in question and, consequently, dismissing with prejudice the State's forfeiture petition and ordering the immediate return of the vessel to the Mortons.[2]

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[1] The Mortons concede that there is sufficient evidence to support this finding.

[2] Section 932.701 defines "contraband article" as, among other things, any controlled substance defined in Chapter 893, which includes marijuana. Section 932.702 makes it unlawful to transport, carry, or convey any contraband article upon any vessel. Section 932.703 provides for the seizure of a vessel used in violation of Section 932.702 and makes the vessel subject to the forfeiture proceedings outlined in Section 932.704.

Left pending after the disposition of the forfeiture proceedings -- and the only matter of concern on this appeal -- was the amended counterclaim sought by the Mortons.[3] Disregarding its prolixity, the counterclaim sought compensation on two theories -- tort and inverse condemnation -- each of which was based on the claim that the Mortons had been wrongfully deprived of the use of their vessel for 124 days, the duration of its detention by the State.

The trial court dismissed the tort claim for failure to state a cause of action and allowed the inverse condemnation claim to proceed to trial by jury. The jury, instructed that probable cause to seize the vessel was a complete defense to the inverse condemnation claim,[4]

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[3] The Mortons' claims were initially filed in a complaint seeking replevin of the boat and damages. When the State brought its forfeiture proceeding, the Mortons incorporated all of their damages claims in a counterclaim to the forfeiture. After disposing of the replevin and other assorted and imagined torts alleged in the complaint, the trial court consolidated the complaint and counterclaim, which by then were virtually identical.

[4] The court, after defining probable cause, instructed the jury:

"If the greater weight of the evidence discloses that the State had probable cause to seize the vessel and had the right to institute forfeiture proceedings, the State is entitled to qualified immunity,

rendered a verdict for the State, expressly finding in its verdict that there was probable cause.[5] The Mortons appeal.

II. The Tort Claim.

The Mortons contend that the judgment in their favor in the forfeiture proceeding establishes that the seizure and the subsequent detention of their vessel were unlawful and entitles them to recover damages in a tort action against the State. We disagree.

Seizure and forfeiture in Florida are governed by Sections 932.701-.704, Florida Statutes, the Florida Contra-

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then your verdict should be for the defendant, and the State is not liable for any damages alleged to have risen as a result of the seizure of the 'Miss Jean.'"

[5] Although the Mortons have conceded that the finding of probable cause is justified, they consider the existence vel non of probable cause to be entirely irrelevant. We are thus not presented with the question whether the determination of probable cause should have been made by the jury. See *City of Pensacola v. Owens*, 369 So.2d 328 (Fla. 1979) (in malicious prosecution action, what facts and circumstances amount to probable cause is a question of law for the court, but whether a certain set of facts and circumstances exist is a question of fact for the jury); *City of Jacksonville v. Alexander,* 487 So.2d 1144 (Fla. 1st DCA 1986) (same; false arrest action).

band Forfeiture Act.[6] The Act provides for the seizure of "any vessel, motor vehicle, aircraft, and other personal property" carrying contraband. § 932.703. It requires that the State promptly institute proceedings to forfeit the seized property. § 932.704 (1). Upon producing "due proof" that the property was being used in violation of the law, the State is entitled to have the property forfeited, and the final order of forfeiture perfects the State's title in the contraband.

Federal law similarly provides for the seizure and forfeiture of carriers of contraband articles. 49 U.S.C. §§ 781-782. Federal law additionally provides:

> "[u]pon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent; but if it appears that there was reasonable cause for the seizure, the court shall cause a proper certificate thereof to be entered and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution. 28 U.S.C. § 2465.

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[6] The Act was patterned after its federal counterpart and, for that reason, Florida courts "place great reliance on federal case authority." *In re Approximately Forty-Eight Thousand Nine Hundred Dollars in U.S. Currency*, 432 So.2d 1382, 1385 (Fla. 4th DCA 1983); *see Griffis v. State*, 356 So.2d 297 (Fla. 1978).

The state and federal statutory schemes, despite differences in phraseology, both allow seizure of a vessel upon probable cause to believe that it is a carrier of contraband, but require for forfeiture proof that the vessel in fact carried contraband. While Florida law has no counterpart to the federal provision for a "probable cause certificate," the absence of such a provision is, as will be seen, of no significance in determining governmental liability for a seizure.

Federal courts recognize that the purpose of the probable cause certificate is "to protect against liability for costs [taxed to the government] or damages [sought from the seizing officer] on account of the institution of [a forfeiture proceeding] where there is reasonable cause for instituting [it] . . . ." *United States v. Tito Campanella Societa di Navigazione*, 217 F.2d 751, 756 (4th Cir. 1954). However, the absence of a certificate does not mean that an owner of seized property will prevail; the existence of probable cause for the seizure remains a barrier to the recovery of damages against the United States. *United*

States v. 1500 Cases, More or Less, 249 F.2d 382 (7th Cir. 1957).

In *Hammel v. Little*, 87 F.2d 907 (D.C. Cir. 1936), the court had before it an action for trespass brought against a seizing officer where the property seized was returned to the plaintiff after his acquittal of the underlying criminal charge. The plaintiff in *Hammel* contended that "probable cause is never a justification for an illegal seizure" where no probable cause certificate is issued. *Id.* at 908. In making this contention, the plaintiff relied (as do the Mortons here) on *The Apollon*, 22 U.S. (9 Wheat.) 362, 373, 6 L.Ed. 111, 114 (1824), in which the court held that the seizer is liable for damages after a property owner's acquittal and cautioned that a party "seizes at his peril." Responding, the *Hammel* court pointed out that in *The Apollon* the court had refused to give a certificate of reasonable cause and observed, therefore, that "the sweeping language of [*The Apollon*] that probable cause is never an excuse for a seizure . . . was doubtless meant to apply only to the case then under consideration by the court." *Hammel v. Little*, 87 F.2d at 909-10. The rather unremarkable

meaning of *The Apollon*, then, is that denial of a probable cause certificate is a determination that the seizure was tortious and gives rise to an action for damages.[7] *Id.* at 912. But the mere absence of a certificate determines nothing.

Although Florida statutory law lacks the protection from damage suits given federal officers by the probable cause certificate, no forfeiture proceeding can go forward under the Florida scheme without a determination that probable cause existed. Following a seizure, the State must promptly proceed against the property by petition for a rule to show cause. § 932.704 (1), Fla. Stat. (1983). The claimant's exclusive avenue of recovery then becomes the forfeiture proceeding itself, where he may prove by a preponderance of the evidence (as the Mortons did here) that the forfeiture statute was not only violated. But a successful claimant becomes entitled only to the return of his property. *In Re Approximately Forty-Eight Thousand Nine*

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[7] Presumable, such an action would be brought under the Federal Tort Claims Act, 28 U.S.C. § 1346 (b).

Hundred Dollars in U.S. Currency, 432 So.2d 1382, 1385 n.6 (Fla. 4th DCA 1983); § 932.703 (1).

The process, then, has two steps: (1) seizure, the validity of which depends on the presence of probable cause to believe that the property seized was being used in violation of the Act, and (2) forfeiture, the validity of which depends on a finding that the property seized was in fact being used in violation of the Act and is thus forfeitable. The Mortons do not dispute that the seizure was based on probable cause[8]; they merely contend that the finding that the vessel was not in fact being used in viola-

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[8] The probable cause to believe that the Miss Jean was used to transport contraband arose in the following fashion. The vessel left Key Largo in the morning to collect lobsters and retrieve some of its lobster traps. Shortly thereafter, a Coast Guard officer boarded the Miss Jean, inspected the ship's documents, told Mr. Morton that there were bales of marijuana floating in the area, and warned him not to pick them up should he come upon them. Around noon, a Florida Marine Patrol plane was dispatched on information that the Miss Jean had marijuana bales aboard. The pilot reported that he saw a bale of marijuana on Miss Jean's transom being pushed into the sea and that the marijuana dispersed as if the bale had been cut open. The pilot radioed other Marine Patrol officers who went to the site by boat and picked up parts of a plastic bag and several pounds of marijuana from the water. When the Miss Jean was boarded and searched soon thereafter, there were no signs of contraband aboard.

tion of the Act retroactively invalidates the seizure.[9] The contention is without merit, and we reject it.[10]

It is well settled that "[i]f a man by warrant is arrested for suspicion of a felony, it is not necessary that he should be found guilty on his trial, in order to justify the arrest," *Hammel v. Little*, 87 F.2d at 910 (quoting Lord Mansfield); a fortiori, if a person's property is seized upon probable cause, it is not necessary that the State prevail in the forfeiture proceeding in order to justify the seizure.[11] "[S]o

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[9] In support of their contention, the Mortons cite only *Lowther v. United States*, 480 F.2d 1031 (10th Cir. 1973). *Lowther* involved property found not to have been used in violation of the law but which was subsequently *destroyed* by federal authorities. Thus, *Lowther* stands for the proposition that where the property is found *not* to be contraband, the owner is entitled to return of the property or to its equivalent. Since the Mortons' property was returned to them, *Lowther* is inapposite.

[10] Our conclusion that the seizure of the Mortons' vessel was not wrongful makes it unnecessary to address whether the seizure, even if wrongful -- that is, unsupported by probable cause -- was nonetheless within the discretionary function exception to Florida's waiver of sovereign immunity. It is apparent, however, that the Mortons' concern that their cause of action in tort might be negated by a sovereign immunity defense led them to resourcefully urge their alternative theory of inverse condemnation.

[11] This is much like the view expressed in *Sponder v. Brickman*, 214 So.2d 631, 632 (Fla. 3d DCA 1968), in the context of a malicious prosecution action:

> "Acquittal of a person tried for violating the law is not sufficient to establish the absence of probable cause for instituting criminal

far as we know it has never been the law that trespass will lie for an act of seizure unless it appears that the act was tortious or unauthorized." *Hammel v. Little*, 87 F.2d at 912. See also *United States v. 1500 Cases, More or Less*, 249 F.2d 382.

III. Inverse Condemnation.

We turn now to the Mortons' contention that the seizure and detention of their vessel sounds not only in tort, but also represents a "taking" by the government giving rise to a claim in inverse condemnation for compensation for their loss of use of the vessel for 124 days. We reject this contention as well.

In Florida, an action for inverse condemnation does not arise from a temporary "taking." *Hillsborough County v. Gutierrez*, 433 So.2d 1337 (Fla. 2d DCA 1983) (where flooding in a landowner's house caused by the county's action was remedied, the temporary ouster sup-

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proceedings. If the converse were the rule, then a public officer . . . would be liable in damages for malicious prosecution. . . Such a state of affairs would be detrimental to the public interest, since public officers would be discouraged from performing their duties conscientiously."

ports a claim in tort, not inverse condemnation). Only a *permanent* deprivation of an owner's use of his property will support such an action. *Department of Health and Rehabilitative Services v. Scott*, 418 So.2d 1032 (Fla. 2d DCA 1982). When governmental action merely impairs the owner's use of his property, "the action does not constitute a 'taking' but is merely consequential damage and the owner is not entitled to compensation." *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So.2d 663, 669 (Fla. 1979). The damages then are *damnum absque injuria* and thus not compensable. *Id.*; *accord Florida East Coast Properties, Inc. v. Metropolitan Dade County*, 572 F.2d 1108 (5th Cir. 1978).

Even more to the point, Florida courts are consistent in their view that "loss of use" claims are not compensable in condemnation or seizure cases. *County of Volusia v. Pickens*, 439 So.2d 276, 278 (Fla. 1st DCA 1983) ("lost profits and business damages are generally not deemed to be property for which compensation is due in the context of condemnation proceedings, absent a special statutory

remedy,")[12]; *City of St. Petersburg v. Wall*, 419 So.2d 1167 (Fla. 2d DCA 1982) (in absence of showing of bad faith, city not liable for damages for loss of use of property during condemnation proceeding), *approved*, 475 So.2d 662 (Fla. 1985); *cf. City of Miami Beach v. Bules*, 479 So.2d 205 (Fla. 3d DCA 1985) (after unsuccessful forfeiture, owner entitled to damages for loss of use during appeal by city only because clearly contemplated by court's order granting city's motion to stay final judgment pending appeal).

We find inapposite the cases relied upon by the Mortons: none supports the proposition that one is entitled to damages for loss of use during a lawful detention. *Lowther v. United States*, 480 F.2d 1031 (10th Cir. 1973), as noted *supra* n.9, involved the permanent destruction of

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[12] See, for example, Section 73.071, Florida Statutes, which provides that where less than an entire property is taken by eminent domain proceedings, resulting business damages may under certain circumstances be recovered.

weapons seized from the owner.[13] *Jaekel v. United States*, 304 F.Supp. 993 (S.D.N.Y. 1969), involved a due process claim under the Tucker Act[14] by a woman whose automobile was seized in connection with the arrest of her daughter on a narcotics charge. The vehicle was subsequently forfeited and sold. The district court held that, because the government had failed to give the owner adequate notice of the forfeiture proceedings, the proceedings were void, and the government was liable for the retail value of the car at the time of the seizure. Likewise, *United States v. One 1965 Chevrolet Impala Convertible*, 475 F.2d 882 (6th Cir. 1973), and *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972), involved invalid forfeitures.

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[13] In *Lowther*, 480 F.2d 1031, the federal government seized weapons alleged to have been possessed illegally. The owner was acquitted of the charges. His application for remission of the forfeiture was denied and, at the trial reviewing the denial, it was discovered that, without notice to the owner, the government had already destroyed the weapons. The appellate court affirmed the trial court's conclusion that this forfeiture amount to a "palpable taking of property without due process." *Id.* at 1035. The appropriate remedy in such a case, the court held, was an action under the Tucker Act, 28 U.S.C. § 1346 (a)(2), permitting suit in the district court against the United States founded upon the unconstitutional forfeiture.

[14] 28 U.S.C. § 1346 (a); see also 28 U.S.C. § 1491.

The clear and singular distinction between the Mortons' inverse condemnation claim and the cases relied on in support of the claim is that the latter all involved property actually appropriated by the government -- that is, forfeited, sold, or destroyed. The Mortons' vessel was merely seized and detained; upon proof that it was not being used in violation of the law, it was returned to them.

The Mortons argue, however, that *Castleberry v. Alcohol, Tobacco & Firearms Division*, 530 F.2d 672 (5th Cir. 1976), supports the proposition that detention damages may be recovered in an inverse condemnation action. In our view, *Castleberry* merely holds that post-seizure, pre-forfeiture relief in the trial court is limited to requiring the government either to institute forfeiture proceedings promptly or to return the property and abandon the seizure. The court observed that a claimant prevailing upon the merits in the forfeiture action would have a Tucker Act due process claim for money damages should the government "tarry unnecessarily" in seeking the forfeiture. *Id.* at 677 n.8. No such due process violation is

evidence in the present case, and the Mortons have never urged that the length of the detention was unreasonable.

Finally, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949), does not hold, as the Mortons contend, that compensation is constitutionally required even for a temporary taking. In *Kimball*, the government had actually condemned the laundry and taken it for its own use, though only for a period of years while its need for laundry facilities existed.

IV.

In sum, there is no contention in the present case that the State lacked the authority to enforce the Florida Contraband Forfeiture Act, the purpose of which clearly is to protect the public from the proliferation of substances, instrumentalities, and the like, related to criminal offenses. To the contrary, the Mortons point to the lawfulness of the governmental action as a necessary element of their inverse condemnation claim. In light of the undisputed existence of probable cause to support the propriety of the seizure, along with notice of forfeiture proceedings

to the boat owners, the absence of unnecessary delay in going forward with the proceedings, and the proscription by Florida courts of "taking" claims based on temporary deprivation, the Mortons' claims for loss of use in tort and in inverse condemnation must fail.[15]

Affirmed.

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[15] In their counterclaim, the Mortons additionally alleged that the Miss Jean was physically damaged and some of its equipment was lost during the time it was detained and while it was in the custody of agents of the State. Such damages, claimed to be approximately $850, are, of course, recoverable even if the seizure was justified. See *City of Miami Beach v. Bules*, 479 So.2d 205 (Fla. 3d DCA 1985) (damage to boat compensable); *One 1978 Green Datsun Pickup Truck v. State ex rel. Manatee County*, 457 So.2d 1060 (Fla. 2d DCA 1984) (right to claim storage fees upon improper seizure), *appeal after remand*, 475 So.2d 1007 (1985) (State liable for loss of seized vehicle following unsuccessful forfeiture proceedings), *rev. denied sub nom. State ex rel. Manatee County v. Kruysman*, 486 So.2d 598 (Fla. 1986); *State ex rel. City of Pompano Beach v. Washington*, 352 So.2d 138 (Fla. 4th DCA 1977) (right to recover for damage resulting from improper towing, storage, and negligent care of automobile). *See also Lowther v. United States*, 480 F.2d 1031. *Compare Formula One Motors, Ltd. v. United States*, 777 F.2d 822 (2d Cir. 1985) (claim brought under Federal Tort Claims Act for automobile so damages by DEA search as to render it destroyed not compensable as falling within exception of 28 U.S.C. § 2680 (c)). However, the Mortons did not insist that these damages be separately decided in the verdict form and make no separate argument about them on this appeal. We consider the Mortons' claim to these damages to have been waived.

In the District Court of Appeal of Florida, Third District

July Term, A.D. 1987

Case No. 86-1141

George M. MORTON and Marlene J. MORTON,
Appellants,
v.
Tom GARDNER, Executive Director, Department of Natural Resources, State of Florida, Appellee

November 2, 1987

Upon consideration, appellants' motion for rehearing is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By Deputy Clerk

SUPREME COURT OF FLORIDA

George M. MORTON, et al., Petitioners,
v.
DEPARTMENT OF NATURAL RESOURCES, ETC., ET AL., Respondents.

Case No. 71,550

District Court of Appeal
Third District No. 86-1141

April 1, 1988

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330 (d).

OVERTON, Acting C.J., EHRLICH, SHAW, BARKETT and GRIMES, JJ., concur

A True Copy
TEST:
Sid J. White
Clerk Supreme Court

by Deputy Clerk

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT IN AND FOR MONROE COUNTY, FLORIDA

Consolidated Action
Case No. 84-358-CA-17
Case No. 84-20123-CA-14

The Forfeiture of One 1980, 39' Morgan Fiberglass Trapper, the motor vessel "Miss Jean," Displaying USCG #626771, and all seized equipment

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and

GEORGE M. MORTON and MARLENE J. MORTON,
Plaintiffs,

vs.

ELTON J. GISSENDANNER, Executive Director,
Department of Natural Resources,
STATE OF FLORIDA,
Defendant.

FINAL JUDGMENT FOR DEFENDANT

Pursuant to the verdict rendered in this action IT IS ADJUDGED that plaintiffs, George M. Morton and Marlene J. Morton take nothing by this action and that the defendant, Elton J. Gissendanner, Executive Director, Department of Natural Resources, shall go hence without day. ORDERED in Key West, Monroe County, Florida this 24th day of April, 1986.

M. Ignatius Lester, Circuit Judge

IN THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

Case No. 86-1141

GEORGE M. MORTON, *et al.*,
Appellants

vs.

ELTON J. GISSENDANNER, *etc*,
Appellee

NOTICE OF FILING ADDITIONAL AUTHORITY

Come now appellants and file as additional authority in the above-styled cause the following decision of the United States Supreme Court.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, No. 85-1199, ___ U.S. ___ (decided June 9, 1987).

James S. Mattson, Esquire
Counsel for Appellant

(Filed June 18, 1987)

Supreme Court, U.S.
FILED
SEP 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-12

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GEORGE M. MORTON and
MARLENE J. MORTON,
Petitioners,

v.

TOM GARDNER, as Executive Director,
Department of Natural Resources,
STATE OF FLORIDA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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ATTORNEYS FOR RESPONDENT

30 pp

QUESTIONS PRESENTED FOR REVIEW

The first question presented has been restated to reflect the fact that the State acted upon probable cause in seizing Petitioners' fishing vessel.

1. Whether the seizure and 124-day detention of a commercial fishing vessel by State authorities during the pendency of a civil forfeiture action in which there was a judicial determination of probable cause and no unnecessary delay in going forward with the proceeding gives rise to a claim for Just Compensation for a temporary "taking" under the Fifth and Fourteenth Amendments to the United States Contitution, pursuant to this Court's decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, ____ U.S. ____, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

2. Whether the decision of this Court in The Apollon, 22 U.S. (9 Wheat) 362, 6 L.Ed. 111 (1824), continues to stand for the principal that a seizing officer seizes at his own peril, that probable cause is not a defense to a seizure absent a statute setting up such a defense, and that the seizing authority is liable in tort to the owner of a seized vessel upon dismissal of the condemnation petition.

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STATEMENT OF THE CASE

The Third District Court of Appeal of Florida ruled that because of the undisputed existence of probable cause to support the propriety of the seizure of a fishing vessel under the Florida Contraband Forfeiture Act and the absence of unnecessary delay in going forward with the proceedings, the Petitioners' claims for loss of use in tort and in inverse condemnation failed. Morton v. Gardner, 513 So.2d 725 (Fla. 1st DCA 1987). The Florida Supreme Court declined to accept jurisdiction to review the decision of the Third District Court of Appeal. Morton v. Gardner, 525 So.2d 879 (Fla. 1988).

SUMMARY OF ARGUMENT

Petitioners first seek to invoke this Court's discretionary jurisdiction on the ground that a 124 day detention by state authorities during the pendency of a civil forfeiture proceeding constitutes a compensable taking pursuant to this Court's decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, ____ U.S. ____, 107 S.Ct. 2378 (1987). Petitioners' reliance on this decision is misplaced, for there was no contention below, nor is there here, that a 124 day detention period was unreasonable. The contention that such delay is an unconstitutional deprivation of private property for which compensation must be provided therefore has no foundation in the record of this case, and should not be entertained by this Court. Moreover, such a ruling would be the death

knell for all state and federal contraband forfeiture laws since the cumulative fiscal burden of such cases would preclude enforcement.

The second question presented for review is purely a state tort law issue. Petitioners state they seek to invoke this Court's discretionary jurisdiction pursuant to 28 U.S.C. ss. 1257(3) and 2101(c). They fail, however, to demonstrate how a Florida court's interpretation of Florida tort law implicates the validity of a treaty or statute of the United States, or the constitutionality of a state statute. While the first question expressly references the Fifth Amendment right to just compensation, the second question and accompanying argument is a mere recitation of federal tort law which has no controlling effect on the present case.

Review should be denied.

ARGUMENT

A. SEIZURE AND A 124 DAY DETENTION OF A COMMERCIAL FISHING VESSEL BY STATE AUTHORITIES DURING THE PENDENCY OF A CIVIL FORFEITURE ACTION IN WHICH THERE WAS A JUDICIAL DETERMINATION OF PROBABLE CAUSE AND NO UNNECESSARY DELAY IN GOING FORWARD WITH THE PROCEEDING DOES NOT GIVE RISE TO A CLAIM FOR JUST COMPENSATION FOR A TEMPORARY "TAKING" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioners rely solely on this Court's decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, ____ U.S. ____, 107 S.Ct. 2378, 96 L. Ed.2d 250 (1987), in arguing that a 124-day detention during the pendency of forfeiture proceedings gives rise to a compensable claim under the Fifth Amendment. After waving First English like a magic wand they pass on to a discussion of federal tort law. Nothing in the First

English decision suggests that it has any application to forfeiture proceedings.

First English involved a regulatory land use ordinance adopted by Los Angeles County which effectively deprived the Church of all use of its real property for a number of years. The ordinance prohibited the construction or reconstruction of any building or structure in an interim flood protection area which included the Church land. The landowner sought to recover damages in inverse condemnation and tort. Other than the theories of recovery, First English and the instant case have nothing in common[1]. This Court in First English narrowly held that, under the circumstances in that case, the landowner was entitled to compensation for

[1]Note, however, this Court in First English did not consider the appellant's tort claim nor did it apply federal tort law principles to the case.

the period of time during which the taking was effective.

In the First English case, the interim ordinance was adopted by the county in January of 1979, and became effective immediately. When the Supreme Court of California denied a hearing in the case on October 17, 1985, the merits of appellant's claim had not been determined. Thus, this Court was concerned with the deprivation of property over a period of years. In contrast the "deprivation" in the present case was only 124 days, a reasonable time for a judicial determination of the Morton's right to the return of their boat under the Florida Contraband Forfeiture Act. As the decision below notes, the Mortons did not contend that the period was unreasonable, nor do they so contend in their petition before this Court. See, Morton v. Gardner, 513 So.2d 725, 730 (Fla.

3rd DCA 1987) (Appendix to Petition at 16).

The decision in First English was expressly limited to the facts presented and did not "deal with the quite different questons that would arise in the use of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like . . . ." 107 S.Ct. at 2389. The decision therefore, premised as it is on a delay of some six or seven years and expressly limited to its facts, is no precedent for holding that the brief time - 124 days - it took for the Florida forfeiture proceeding to run its course is likewise a taking. In fact, because petitioners have never questioned the reasonableness of this time frame, they have not properly preserved the constitutional issue that First English addresses.

The First English decision stands upon a well-established body of decisional law holding that government must provide compensation when it has exercised its right to use private property. Some of those decisions are cited in the First English case. See, e.g., Kimball Laundry Co. v. United States, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949) (temporary use by the Army of a laundry plant); United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946) (temporary use by United States of tenants' leasehold interests); United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945) (temporary occupancy of a leased building).

In each of these cases the government was acting pursuant to its condemnation powers and had taken specific property rights and interests for government use.

Appellants, however, have cited no case ruling that the government is required under the Fifth Amendment to compensate a property owner for the temporary loss of use resulting from a contraband forfeiture proceeding where there has been a judicial determination of probable cause for the seizure and no unnecessary delay in reaching a final determination.

Forfeiture provisions are an important weapon in both the federal and state battle against the growing drug trafficking problem. Given the nature of the underlying public policy being served, the process due an owner under the Fifth and Fourteenth Amendments is limited. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed. 2d 452 (1974), in which this Court noted that "preseizure notice and hearing might frustrate the interests served by the

statutes, since the property seized . . . will often be of a sort that could be removed to another jurisdiction, destroyed or concealed, if advance warning of confiscation were given." 416 U.S. at 679, 94 S.Ct. at 2090, 40 L.Ed. 2d at 466. Likewise, the government's liability for consequential damages arising out of contraband-related property seizures, in order for forfeiture to be an effective tool, must be narrowly limited.

Under federal forfeiture statutes liability is limited where:

> if it appears that there was reasonable cause for the seizure, the court shall cause a proper certificate thereof to be entered and the claimant shall not in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution.

28 U.S.C. §2465.

Federal courts have held that the existence of probable cause for the seizure operates as a barrier to the recovery of damages against the United States. United States v. 1500 Cases, More or Less, 249 F.2d 382 (7th Cir. 1957). As pointed out in the decision below, while Florida statutes lack the protection from damage suits given federal officers by the probable cause certificate, no forfeiture proceeding can go forward without a determination that probable cause existed. (Appendix to Petition at 8). Where there is a judicial determination of probable cause a successful claimant is entitled only to the return of his property. Morton v. Gardner, supra; In Re Approximately Forty-Eight Thousand Nine Hundred Dollars in U.S. Currency, 432 So.2d 1382, 1385 n.6 (Fla. 4th DCA 1983).

Due process also requires that a prompt post-seizure hearing be provided. Castleberry v. Alcohol, Tobacco & Firearms Division, 530 F.2d 672 (5th Cir. 1976). Florida law likewise requires prompt forfeiture proceedings. Section 932.704(1), Florida Statutes, in relevant part, provides:

> The state attorney within whose jurisdiction the contraband article, vessel, motor vehicle, aircraft, or other personal property has been seized because of its use or attempted use in violation of any provisions of law dealing with contraband, or such attorney as may be employed by the seizing agency, shall promptly proceed against the contraband article, vessel, motor vehicle, aircraft, or other personal property by rule to show cause in the circuit court within the jurisdiction in which the seizure or the offense occurred . . . . (e.s.)

As stated, Petitioners have at no time contended that the length of the detention was unreasonable.

The federal forfeiture cases curiously cited by Petitioners under their state law tort argument (Petition, Point B), cannot support their constitutional claim based upon a "temporary taking." Although rooted in the Fifth Amendment, these decisions stand on the reasonable proposition that where the government sells or destroys seized property and the owner later prevails in the forfeiture proceeding, the owner is entitled to receive the value of what was taken. See Lowther v. United States, 480 F.2d 1031 (10th Cir. 1973) (owner entitled to compensation for guns destroyed by government after seizure); United States v. One 1965 Chevrolet Impala Convertible, 475 F.2d 882 (6th Cir. 1973) (owner whose automobile was returned to him by government was also entitled to damages for depreciation during the time the vehicle was in government custody); United

States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353 (5th Cir. 1972) (owner may proceed under Tucker Act to recover vehicle which had been improperly forfeited for unpunishable conduct); Castleberry v. Alcohol, Tobacco & Firearms Division, 530 F.2d 672 (5th Cir. 1976) (if claimant prevails in forfeiture he may sue government for monetary damages under Tucker Act; nature of damages not defined); but see, Jarboe-Lackey Feedlots, Inc. v. United States, 7 Cl.Ct. 329 (1985) (no recovery for temporary seizure of meat thought to be implanted with unlawful drugs, as such action is inherent exercise of police power and hence noncompensable).

No decision cited by Petitioners stands for the proposition that a prevailing property owner in a forfeiture proceeding is entitled to damages for the loss of use of his property during the pendency of the

action. The forfeiture decisions cited above hold only that the government is obligated to return the property or compensate the owner for the full (undepreciated) value of what was taken. The court below ruled that the Mortons had waived any claim for damage to their fishing vessel. Morton v. Gardner, supra, at 731, n.15 (App. to Petition at A-17). It is clear then that what the Mortons seek to recover are damages to their fishing business. Such damages are not recoverable under the Fifth Amendment. Even where the government condemms a temporary interest in property, it is not obligated to pay business damages. United States v. General Motors Corp., 323 U.S. 373, 383 (1945) ("injury to the business . . . in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning").

B. THE DECISION OF THIS COURT IN THE APOLLON, 22 U.S. (9 WHEAT) 362 (1824), IS NOT BINDING UPON STATE COURTS AND PRESENTS NO BASIS FOR THE EXERCISE OF THIS COURT'S JURISDICTION.

In The Apollon, 22 U.S. (9 Wheat) 362 (1824), this Court decided a claim essentially tortious in nature against a United States tax collector for the wrongful seizure of a French vessel. The decision addressed no constitutional issue or provision. It held that under the law of "municipal seizures," as applied in the federal courts, the seizing officer was liable for damages unless the court, pursuant to statutory authorization, found probable cause for his actions. Id. at 372.

Although The Apollon and other federal forfeiture cases were addressed below in the decision of the Florida Third District Court of Appeal, the ruling on the tort

claim was grounded wholly in Florida law:

> Although Florida statutory law lacks the protection from damage suits given federal officers by the probable cause certificate, no forfeiture proceeding can go forward under the Florida scheme without a determination that probable cause existed. Following a seizure, the State must promptly proceed against the property by petition for a rule to show cause. §932.704(1), Fla.Stat. (1983). The claimant's exclusive avenue of recovery then becomes the forfeiture proceeding itself, where he may prove by a preponderance of the evidence (as the Mortons did here) that the forfeiture statute was not violated. But a successful claimant becomes entitled only to the return of his property. In Re Approximately Forty-Eight Thousand Nine Hundred Dollars in U.S. Currency, 432 So.2d 1382 1385 n. 6 (Fla. 4th DCA 1983); § 932.701(1).
>
> The process, then, has two steps: (1) seizure, the validity of which depends on the presence of probable cause to believe that the property seized was being used in violation of the Act, and (2) forfeiture, the validity of which depends on a finding that the property seized was in fact being used in

> violation of the Act and is thus forfeitable. The Mortons do not dispute that the seizure was based on probable cause, they merely contend that the finding that the vessel was not in fact being used in violation of the Act retroactively invalidates the seizure. The contention is without merit, and we reject it.

Morton v. Gardner, 513 So.2d 725, 768-729 (Fla. 3rd DCA 1987). As the court below read the Florida statute, the existence of probable cause forecloses any damage remedy. If probable cause is found to exist, the claimant's remedy is to prove that he did not violate the forfeiture statute.

The Petitioners herein have not shown either that federal law controlled the tort claim or that the Florida court's decision was grounded in other than state law. Hence, regardless of whether the instant decision is perfectly consistent with the ruling in The Apollon or other federal

cases applying nonconstitutional principles, this Court lacks jurisdiction to review a question of Florida tort law.[2] Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions"). Although federal forfeiture cases, including The Apollon, may have been discussed in the opinion below "[t]his Court . . . reviews judgments, not statements in opinions." Black v. Cutter

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[2] Petitioners acknowledge that the issue is strictly a matter of Florida law: "The State of Florida has waived sovereign immunity for tortious acts of its employees, including intentional torts as long as those employees are acting within the scope of their employment. Fla.Stat. §768.28. Seizure and detention of a vessel is, at a minimum, the intentional tort of interference with property." (Petition at 24)

Laboratories, 351 U.S. 292, 297 (1956). The tort claim presented no basis for the adjudication of any federal right. Hence, this Court's jurisdiction, if any, depends strictly upon the Fifth Amendment "temporary taking" claim based upon the 124 days required to resolve the forfeiture action.

CONCLUSION

This Court's decision in First English was based upon an assumption that the Los Angeles County ordinances denied appellant all use of its property for a considerable period of years. Petitioners never contended that the 124 day temporary detention of their fishing vessel during the pendency of the forfeiture proceeding was an unreasonable delay. Expansion of the holding in First English to a reasonable, temporary detainment of a boat during a contraband forfeiture action is unwarranted. Federal tort law principles as stated in The Apollon have no applicability to Florida tort law. Review should be denied.

Respectfully submitted this 27th day of September, 1988.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA has been furnished, by U.S. Mail, to James Stewart Mattison, James S. Mattson, P.A., Post Office Box 586, Key Largo, Florida 33037, Attorney for Petitioner, this 27th day of September, 1988.

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